In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 840

ADAM WALTER STRAUB, A/K/A BILLIE LEE,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of nine counts charging illegal acquisition, transfer and sale of marihuana, in violation of 26 U.S.C. 4742(a), 4744(a), and 21 U.S.C. 176a. He was sentenced to five years' imprisonment on each of six counts and two years' imprisonment on each of the remaining counts, the sentences to run concurrently. In addition, petitioner was fined $1,000 on each count. The court of appeals affirmed *per curiam* (Pet. App. A; 351 F. 2d 304).

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The government's evidence, the sufficiency of which is not challenged here, showed that petitioner made three sales of marihuana in February 1963 (see R. 3–5, 9–10, 13, 23, 49, 71–74, 92, 104, 119–123). In addition, a government agent testified that he served a notice on petitioner's counsel on May 3, 1963, demanding production within eight days of official order forms required to be retained by transferors and purchasers of narcotics under 26 U.S.C. 4742 (G. Ex. 5) and that no such forms were presented to the Bureau of Narcotics (R. 113–119). In its charge to the jury, the trial court stated—in accordance with 26 U.S.C. 4744 (a)[1]—that if the prosecution had established receipt of the notice of demand by the petitioner and a failure to comply, the jury could infer, although it need not do so, that petitioner acquired the marihuana without having paid the prescribed tax (R. 179). Although no objection was made to this charge, petitioner now claims that the instruction constituted reversible error.

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[1] It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—

(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by 4741(a).

The failure to furnish an order form upon demand is not an element of the offense of acquiring marihuana without paying the transfer tax. However, when the demand and failure are shown, the statutory presumption arises that petitioner's possession is unlawful. *Gondron* v. *United States,* 256 F. 2d 205 (C.A. 5), certiorari denied, 358 U.S. 865; *Williams* v. *United States,* 260 F. 2d 125, 130–131 (C.A. 8), certiorari denied, 359 U.S. 918. In the present case, the demand was served upon an attorney who represented petitioner at the time of service and throughout the judicial proceedings and who signed it as agent for petitioner. Neither the federal agent's testimony as to the demand and failure to comply nor the introduction into evidence of the notice of demand itself was objected to at trial (see Pet. App. 31–37), and no claim was made that petitioner was unaware of the demand. In these circumstances, the court was plainly justified in advising the jury of the statutory presumption. See *Manning* v. *United States,* 274 F. 2d 926 (C.A. 5); *Miller* v. *United States,* 273 F. 2d 279 (C.A. 5), certiorari denied, 362 U.S. 928.[2]

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[2] *United States* v. *Turner*, 132 F. Supp. 336 (N.D. Ill.), and *Charles* v. *United States*, 215 F. 2d 825 (C.A. 9), relied on by petitioner (Pet. 3), are inapposite. In neither case did the government show, as it did here, that a demand for the tax order form was made.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966